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In the
Supreme Court of the United States

OCTOBER TERM, 1957

No. 163

UNITED STATES STEEL CORPORATION, *Appellant,*

vs.

STATE OF WASHINGTON.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Washington entered in this action on December 3, 1957, affirming the judgment of the Superior Court of the State of Washington for Thurston County, and submits this statement in support of its contention that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington has not yet been officially reported; it appears unofficially at 151 Wash. Dec. 200, 316 P.(2d) 1099 (1957), and is annexed hereto as Appendix A. The opinion of the Superior Court of the State of Washington for Thurston County is not reported officially or unofficially, but is annexed as Appendix B.

JURISDICTION

Appellant, United States Steel Corporation, commenced this action in the Superior Court of the State of Washington pursuant to Section 82.32.180 Revised Code of Washington to recover business and occupation taxes and interest thereon assessed against it by the State for the privilege of engaging in business activities within Washington. Appellant sought to recover these taxes on the ground that the taxing statute involved discriminated against interstate commerce and that the taxes were not apportioned to exclude appellant's activities in interstate commerce in violation of the Commerce Clause of the United States Constitution. The judgment from which this appeal is taken is the judgment of the Supreme Court of the State of Washington entered December 3, 1957, which is attached hereto as Appendix C. Judgments of that court are final on all parties. RCW 2.04.220 (1951). Notice of appeal to this Court was filed in the Supreme Court of the State of Washington on February 27, 1958. Time for docketing the case with this Court was enlarged for a period extending to and including July 15, 1958, by an order of the Supreme Court of Washington entered February 27, 1958, pursuant to Rule 13(1) of this Court.

The statute drawn in question on the ground of being repugnant to the United States Constitution is Chap. 180, Title II, Laws of 1935, as amended; RCW 82.04.220, 82.04.240, 82.04.250, 82.04.270, 82.04.295, 82.04.430(6), and 82.04.440 (1951). The statute provides in part at RCW 82.04.220 (1951):

> "*Business and Occupation Tax Imposed.* There is levied and shall be collected from every person a

> tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be."

The pertinent statutory provisions are lengthy and therefore are set forth in Appendix D.

The decision of the highest court of the State of Washington sustained the validity of the foregoing statute as applied in this case; therefore, this Court has jurisdiction on appeal. 28 U.S.C. §1257(2); *Railway Express Agency, Inc., v. Virginia,* 347 U.S. 359 (1954); *Memphis Steam Laundry Cleaner, Inc., v. Stone,* 342 U.S. 389 (1952); *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69 (1946); *Freeman v. Hewit,* 329 U.S. 249 (1946).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(1) **APPORTIONMENT.** Does the Commerce Clause of the United States Constitution (Article I, §8, Clause 3) permit the State of Washington to levy a tax on the privilege of engaging in business activities measured by the entire gross proceeds of appellant's interstate sales to Washington customers without apportionment to exclude that portion of the gross proceeds of such sales which appellant has shown are attributable to appellant's business activities outside the State of Washington?

(2) **DISCRIMINATION.** Does the State of Washington discriminate against interstate commerce in violation of the Commerce Clause of the United States Con-

stitution (Article I, §8, Clause 3) by taxing both the privilege of manufacturing and the privilege of selling within the state where each tax is measured by the entire gross proceeds of sales, but persons taxable as sellers are exempted from the tax on manufacturers, thus insuring that persons engaged in business locally pay but one tax on their combined Washington manufacturing and selling activities, while persons engaged in interstate commerce, subject to taxation for the privilege of engaging in business not only in Washington, but also in the state of manufacture, are subject to multiple taxation?

STATEMENT OF THE CASE

The sales transactions involved in this action were those of Columbia Steel Company, a Delaware corporation, having its principal office in San Francisco, California. The sales were made between August 1, 1950, and December 31, 1951. Thereafter, as the result of corporate mergers, the interest of Columbia Steel Company in this action and the relief sought thereunder was vested in the appellant, United States Steel Corporation. For convenience, both companies will be referred to as "appellant" since the merger is not significant for the purposes of this appeal.

Appellant's business was that of manufacturing and marketing iron and steel products and by-products. None of these products was manufactured in the State of Washington. Approximately 25% of the appellant's gross proceeds of sales to Washington customers was attributable to sales of products manufactured by appellant in its mills located in the State of California.

All other proceeds of sales to Washington customers were derived from goods manufactured outside the State of Washington by corporations which were separate entities but were under common control with appellant. The activities of all producing mills, including those owned by appellant, were subject to the taxation and revenue laws of the respective states in which the mills were located.

Appellant maintained only one office in the State of Washington. It was located in Seattle to provide liaison between customers in Washington, Alaska and portions of Idaho and the producing mills. The only product warehoused in this state by appellant was wire rope, in small quantities. Local sales from this stock of goods accounted for less than 1¼% of appellant's total volume of sales to Washington customers, and taxes paid on these sales are not involved in this action. Interstate sales of the same commodity (wire rope) accounted for less than 2¼% of the taxpayer's total sales to Washington customers. All other sales to Washington customers were interstate sales of products not available in a Washington warehouse, and, whether manufactured by appellant or not, were transported by common carriers directly to the purchasers within the State of Washington from the states in which the producing mills were located. The products were priced at the producing mill and shipped f.o.b. the point of shipment, and the sales were made upon terms under which title passed to the customer upon delivery to the common carrier at the place of shipment and the merchandise was thereafter at the customer's risk.

Appellant paid when due a business and occupation tax upon the gross proceeds of sales of wire rope made from local warehouse stocks. As to all interstate sales, no tax was paid because the taxpayer asserted its rights under the Commerce Clause, United States Constitution.

The Washington State Tax Commission refused to grant the protection of the Commerce Clause to these interstate sales and failed to apportion the proceeds to permit a partial refund. On November 29, 1951, and again on August 11, 1955 (during the pendency of this action) the Tax Commission levied a deficiency or additional assessment against the appellant for business and occupation taxes measured by the entire gross proceeds of these sales in interstate commerce. The additional assessment did not apportion to any other state any part of the gross proceeds of such sales and did not, in arriving at the tax represented by such additional assessment, deduct from the measure of the tax any portion of the gross proceeds of such sales.

The Tax Commission failed to make an apportionment even though all of the records of the taxpayer necessary for such an apportionment were available to the Tax Commission.

The appellant paid the taxes assessed, together with interest thereon, and appealed from the Tax Commission deficiency or additional assessment to the Superior Court of the State of Washington as permitted by RCW 82.32.180. Appellant's complaint and notice of appeal in the trial court alleged in part:

"The aforesaid additional assessment was based

> upon a tax measured by amounts derived from business which the State of Washington is prohibited from taxing under Article I, §8, Clause 3 of the Constitution of the United States of America * * *."

The case was tried in the Superior Court on stipulated facts sufficient to provide the court with the information generally employed by other taxing jurisdictions in establishing apportionment formulae. Furthermore, the appellant offered, at the trial, to present whatever additional facts the trial court might desire to bring about an apportionment. Both the appellant and respondent argued to the trial court the issues of apportionment and discrimination which are raised on this appeal. The trial court and the Supreme Court of the State of Washington rejected both of these contentions and upheld the validity of the tax. With respect to discrimination the Supreme Court of the State of Washington held, at 151 Wash. Dec. 200, 201, 316 P.(2d) 1099, 1100 (1957):

> "Its contention that the business and occupation tax violates Art. I, §8, of the United States constitution was denied in *B. F. Goodrich Co. v. State,* 38 Wn.(2d) 663, 231 P.(2d) 325 * * * ;"

and the court rejected appellant's contention that the Commerce Clause required an apportionment by stating at 151 Wash. Dec. 200, 202, 316 P.(2d) 1099, 1101 (1957):

> "Appellant argues that the tax should be apportioned between interstate and local activities. There is no question of apportionment here. The tax is measured solely by appellant's local wholesale and retail activities. No part of the tax is at-

tributable to its manufacturing or other out-of-state activities. The sales are negotiated within the State of Washington, and the fact that delivery is made direct to the purchaser does not change the nature of the local transaction."

THE QUESTIONS ARE SUBSTANTIAL

A. The Question of Apportionment Is Substantial

If every state levied a tax such as the Washington business and occupation tax (a tax upon the privilege of engaging in business activities without regard to the extent to which those activities occur within the state) each interstate business would pay *double* the tax paid by its local competitors.

Manifestly, this is a result which the Commerce Clause of the United States Constitution was designed to prevent. As this Court stated in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 256 (1938):

> "The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove."

Furthermore, this is a tax on "gross" proceeds of sales. Washington is not prohibited constitutionally from raising the rate of the tax to whatever level it might desire. A double imposition of the present tax is burdensome on interstate commerce. If the rate were raised, a double tax might stop the flow of interstate commerce.

> "The immunities implicit in the commerce clause and the potential taxing power of the state can hardly be made to depend, in the world of prac-

> tical affairs, on the shifting incidence of the varying tax laws of the various states at a particular moment." *Freeman v. Hewit*, 329 U.S. 249, 256 (1946).

This is particularly significant when we note that the Legislature of the State of Washington has seen fit to increase the rate of the tax here in question by 60 % since its adoption in 1935.

Apportionment is necessary in order that local and interstate business will each pay this "privilege" tax in proportion to the value of the privilege conferred by the state. That this is a "privilege" tax is answered by the statute itself, which characterizes the tax as one "for the act or privilege of engaging in business activities." RCW 82.04.220. This interpretation has been affirmed by the Supreme Court of the State of Washington in *B. F. Goodrich Co. v. State*, 38 Wn.(2d) 663, 231 P.(2d) 325 (1951); *Bloxom v. Henneford*, 193 Wash. 540, 76 P.(2d) 586 (1938); and by this Court in *Gwin, White & Prince, Inc., v. Henneford*, 305 U.S. 434 (1939); *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937); and *Fisher's Blend Station v. Tax Commission*, 297 U.S. 650 (1936).

The tax in question is measured by gross receipts from interstate commerce where title passes and the goods are delivered to the buyer outside the state. This Court has sustained taxes measured by gross receipts from interstate transactions where those receipts were a fair measure of the privilege conferred by the taxing state. *American Manufacturing Co. v. St. Louis*, 250 U.S. 459 (1919); and *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). But where interstate

commerce is responsible for a substantial portion of the receipts this Court has required an apportionment to limit the taxing state to the value of its privilege. *Central Greyhound Lines v. Mealey,* 334 U.S. 653 (1948); and *Bass, Ratcliff & Gretton, Ltd., v. State Tax Commission,* 266 U.S. 271 (1924).

Apportionment is required in the present case because:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure *without apportionment,* receipts derived from activities in interstate commerce * * *." *J. D. Adams Mfg. Co. v. Storen,* 304 U.S. 307, 311 (1938). (Emphasis supplied).

This Court has consistently condemned taxation of interstate business "without apportionment." The necessary implication is that an "apportioned" tax would be valid. Appellant contends that the tax here imposed by the State of Washington is the type of tax on interstate commerce which this Court has said requires apportionment. If not, the requirement of apportionment discussed in the decided cases is meaningless. This is a substantial constitutional question requiring plenary consideration of this case.

This case is not governed by *Field Enterprises, Inc., v. State of Washington,* 47 Wn.(2d) 852, 289 P.(2d) 1010 (1955); affirmed *per curiam* 352 U.S. 806 (1956), or *Norton Co. v. Department of Revenue,* 340 U.S. 534 (1951). In neither of those cases was the issue of apportionment before the Court. Neither Norton nor Field requested any relief other than complete immunity from the taxes in question. Nor is the appellant in

a position comparable to the taxpayer in *Department of Treasury v. Ingram-Richardson Mfg. Co.*, 313 U.S. 252 (1941), where the taxpayer failed to give the state an opportunity to apportion tax. Here, the Tax Commission, the Superior Court and the State Supreme Court have all refused to acknowledge the constitutional requirement of apportionment, although at every stage of the proceeding the appellant has urged the issue of apportionment and has presented facts from which an apportionment could be made. The Tax Commission had before it all the appellant's business records and the state courts had before them stipulated facts relating to the extent of the appellant's local activities as compared with all activities which contributed to the gross proceeds of sales involved. An examination of these factors demonstrates beyond any question that appellant's Washington activities contribute only a small proportion to the total proceeds of sales upon which the tax has been based.

The refusal of the Washington courts to require an apportionment in this case is based largely upon a misinterpretation of this Court's decision in *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951), and upon this Court's affirmance *per curiam* of *Field* Enterprises, *Inc., v. State of Washington*, 352 U.S. 806 (1956), which was based solely upon the *Norton* case. The *issue* in those cases was whether or not the states in question had authority to levy *any* tax at all. In the *Norton* and *Field* cases this Court found in the local retail outlet maintained by the taxpayer a sufficient "local incident" to bring the interstate transactions

within the taxing power of the state. But in every instance where an apportionment is required there is always a "local incident" to support the tax. This case begins with the issue that *Norton* and *Field* did not present; that is—does the *measure of the tax* fairly reflect the privilege conferred by the taxing state?

The Washington Supreme Court is mistaken in its characterization of the tax in question. In the course of the opinion below, *U. S. Steel Corporation v. State of Washington,* 151 Wash. Dec. 200, 202, 316 P.(2d) 1099, 1101 (1957), the Court states:

> "The tax is measured solely by appellant's local wholesale and retail activities."

Actually, RCW 82.04.220 specifically states:

> "Such tax shall be measured by the application of rates against * * * gross proceeds of sales * * *."

Appellant's business is a "unitary" one. Its eventual sales are the culmination of a whole series of activities commencing with the beginning of manufacture. In such a situation the gross proceeds of its sales are attributable in some measure to every phase of this "unitary" business. As the agreed facts in this case so clearly demonstrate, the overwhelming proportion of that unitary business is conducted outside the State of Washington.

Apportionment of taxes upon a "unitary" business engaged in interstate commerce was required by this Court in *Hans Rees' Sons v. North Carolina ex rel. Maxwell,* 283 U.S. 123, 133 (1931), where it is stated:

> "Undoubtedly, the enterprise of a corporation which manufactures and sells its manufactured

> product is ordinarily a unitary business, and all the factors in that enterprise are essential to the realization of profits. The difficulty of making an exact apportionment is apparent and hence, when the state has adopted a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases. But the fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as 'component parts of a single unit' so that the entire net income may be taxed in one state regardless of the extent to which it may be derived from the conduct of the enterprise in another state."

The concept of the "unitary business" is just as applicable to gross receipts taxes as it is to income taxes. If every "local incident" were the occasion for a full imposition of tax, burdens on interstate commerce would occur with every state in which the unitary business might conduct some portion of its activities. The type of tax imposed is immaterial where there is shown a substantial adverse effect on interstate commerce. As this Court held in *Interstate Oil Pipeline Co. v. Stone,* 337 U.S. 662, 666 (1949):

> "* * * We are concerned with the practical operations of challenged state tax statutes, not with their descriptive labels."

Furthermore, the issue of apportionment is not answered by the traditional argument of the State of Washington that manufacturing and selling activities

may be segregated and the seller's state may tax manufacturing and the buyer's state may tax selling.

This case involves the manufacture of specialized iron and steel products and not all of the activities subsequent to manufacture occur within the State of Washington. Solicitation of Washington customers occurs in Washington and some other activities incidental to the operation of its one local office occur there, but all other activities incidental to inspecting, checking, and shipping, together with the acceptance of the orders in question, occur outside of the state. It has been agreed by the state that delivery and passage of title to all goods involved occurred at the points of shipment outside the State of Washington; and those activities will support a privilege tax imposed by the state of shipment. *Department of Treasury v. Wood Preserving Corp.*, 313 U.S. 62 (1941).

Moreover, the State of Washington imposes the same tax involved in this action to the full extent when it is the state in which such a shipment occurs. Assuming for the purposes of illustration that each state had Washington's business and occupation tax, the selling activity alone (without regard to the manufacturing activities of the unitary business) would be subject to tax both in the state of shipment and in the state where the solicitation of the sale occurs. Appellant respectfully submits that this is a risk of multiple taxation which the Constitution does not permit.

In conflicts between state taxes and the Commerce Clause this Court is faced with:

"* * * The double demand that interstate busi-

> ness shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business." *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 258 (1938).

This is one of those cases where these historic demands can only be resolved by application of a proper apportionment formula. A failure to apportion the tax in this case may well result in a host of new taxes based on a "local incident" but levied without apportionment on gross receipts attributable to interstate activities. On the other hand, apportionment preserves the right of each state to that portion of the proceeds of interstate commerce which fairly reflect the value of the privilege conferred by that state.

Appellant respectfully submits that the results required by the Constitution can be reached only by this Court's plenary consideration of this case.

B. The Question of Discrimination Is Substantial

The Legislature of the State of Washington has adopted a taxing scheme in its business and occupation tax which deliberately discriminates against interstate commerce and in favor of local business, in violation of the Commerce Clause. As this Court stated in *Gwin, White & Prince, Inc., v. Henneford,* 305 U.S. 434, 438 (1939):

> " * * * under the commerce clause, in the absence of congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce * * *."

Washington does not manifest this discrimination

blatantly by a double tax payable to the State of Washington on interstate business, but rather by a cleverly contrived exemption feature which rewards those businesses which refrain from engaging in interstate commerce. *The exemption is lost only when the channels of interstate commerce are utilized.*

The State Legislature's intention to discriminate against interstate commerce is best demonstrated by reviewing the history of this exemption feature. The original Revenue Act, Laws of 1935, Chap. 180, §6, provides in part:

> "That persons taxable under paragraphs (a) [for extracting] or (b) [for manufacturing] of said section [4] shall not be taxable under paragraph (d) [for wholesaling] of said section with respect to making sales at wholesale of products extracted or manufactured within this state by such persons."

As a result a local manufacturer-wholesaler who was taxed locally on manufacturing did not pay the tax on wholesaling which was imposed upon those manufacturer-wholesalers who manufactured outside the state and shipped goods to purchasers within the state.

The discriminatory nature of the exemption was readily apparent to the Washington Supreme Court which held the business and occupation tax unconstitutional as to sales similar to those involved in this action, and stated in *Columbia Steel Co. v. State*, 30 Wn. (2d) 658, 662, 192 P.(2d) 976 (1948):

> "Regardless of the uncertainty on the question of what types of state taxation on interstate commerce are allowable, it may be definitely stated that

> any tax which places interstate commerce at a disadvantage in competition with local commerce is prohibited by the Federal constitution."

As a result of the *Columbia Steel* case the Legislature amended the exemption section so as to retain its discriminatory characteristics while erecting a facade of equal treatment of local and interstate business. Laws of 1950, Chap. 5, §2, reversed the language of the exemption section of the prior law to provide:

> "That persons taxable under paragraphs (c) [for retailing] or (e) [for wholesaling] of said section [4] shall not be taxable under paragraphs (a) [for extracting], (b) [for manufacturing], or (d)(2) [for wheat flour manufacturing] of said section with respect to extracting or manufacturing of the products so sold."

If every state had such a discriminatory exemption feature, interstate businesses would pay the full unapportioned tax on the privilege of engaging in business in each state in which its business occurred; whereas its local competitors (who might choose to manufacture and market within a single state) would pay the tax only once. The activities of the interstate business and the local business might be the same; but the tax impact would be different. Appellant, in its competition with local manufacturers, must overcome the advantage which the local industry enjoys by its proximity to the Washington market. Interstate commerce is without constitutional protection against this disadvantage in its competition with local industry, but the Constitution does protect interstate commerce against state taxation "whatever its form" which discriminates against it.

Washington's exemption feature is not an incentive for businesses to come to Washington to engage in manufacturing. If this were the purpose of the exemption it would be highly desirable to encourage local production for export. Under Washington's tax a manufacturer who ships outside the state in effect loses his exemption. Only the local manufacturer who produces for local consumption is favored.

This exemption feature recognizes that a duplication of this tax measured by *gross receipts* could be confiscatory. As a result local business (regardless of the extent of its activities) has been limited to one imposition of the tax. But no such consideration is given to interstate commerce which Washington taxes to the full extent. Unless this Court intervenes in this case, interstate commerce will be subjected to additional taxation in every state to which it reaches.

CONCLUSION

Appellant respectfully submits that Washington's blatant disregard of the requirements of the Commerce Clause as exemplified by the tax imposed in this case presents substantial constitutional questions requiring plenary consideration by this Court.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

UNITED STATES STEEL CORPORATION, *Appellant,* vs. THE STATE OF WASHINGTON, *Respondent.*	No. 33747 EN BANC October 31, 1957

This is an action to recover the business and occupation tax assessed against the plaintiff by the tax commission of the state of Washington. The tax was measured by the gross proceeds of its sales to Washington customers pursuant to the provisions of Title 82 of RCW.

The plaintiff is a New Jersey corporation. It does not manufacture any of its products in this state. About seventy-five percent of the goods it sells in Washington is purchased from other manufacturers outside of the state.

The plaintiff maintains a local sales office in Seattle, Washington, where an average of forty-two residents are employed. It sells at retail and wholesale to Washington customers. Most of the goods are ordered by the local office before or while they are in the process of manufacture. They are priced at the place of manufacture and shipped f.o.b. direct to the purchaser under purchase contracts which pass title to the buyers at the place of shipment.

The local sales force contacts prospective purchasers; takes their orders; passes upon the credit of purchasers, although, in rare instances, the plaintiff's San Francisco office gives final approval; forwards the orders to the manufacturers for confirmation, after which it sends a written acceptance of the order to the custo-

mers; keeps all of the records of the sales transactions; and handles billing and collections, maintaining a bank account for that purpose. Customer complaints are investigated by the local office, and recommendations for settlement are made, which are finally approved by the San Francisco office.

No new question is presented by the plaintiff on its appeal.

Its contention that the business and occupation tax violates Art. I, §8, of the United States constitution was denied in *B. F. Goodrich Co. v. State*, 38 Wn.(2d) 633, 231 P.(2d) 325, wherein we said:

> "All those who sell at wholesale within this state are now taxed equally upon that activity regardless of whether they manufacture in Washington or elsewhere. Because some other state might exercise its undoubted right to tax the privilege of manufacture with respect to goods ultimately sold in Washington (citing cases), this state need not forego its right to tax the business of selling those goods. Each state must derive its revenues from what goes on within its own borders. And if Washington's statute exempts local manufacturers from paying their tax as manufacturers, providing they also pay it as sellers, that, as appellant admits, can be of no concern to one who manufacturers out of the state."

From the record, it appears that the sales activities of the Seattle office of appellant are decisive factors in establishing and holding the local market for its goods. Thus, it is subject to the tax. *Field Enterprises Inc. v. State*, 47 Wn.(2d) 852, 289 P.(2d) 1010 (affirmed, 352 U.S. 806, 1 L.ed.(2d) 39, 77 S.Ct. 55).

Appellant argues that the tax should be apportioned between interstate and local activities. There is no question of apportionment here. The tax is measured solely by appellant's local wholesale and retail

activities. No part of the tax is attributable to its manufacture or other out-of-state activities. The sales are negotiated within the state of Washington, and the fact that delivery is made direct to the purchaser does not change the nature of the local transaction. *Norton Co. v. Department of Revenue of the State of Illinois,* 340 U.S. 534, 95 L.ed. 517, 71 S.Ct. 377; *Field Enterprises Inc. v. State, supra.*

The judgment is affirmed.

MALLERY, J.

We Concur:

HILL, C. J.

.....

DONWORTH, J.

.....

FINLEY, J.

.....

WEAVER, J.

.....

ROSELLINI, J.

.....

OTT, J.

.....

FOSTER, J.

.....

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

UNITED STATES STEEL CORPORATION, a New Jersey corporation, *Plaintiff*, vs. STATE OF WASHINGTON, *Defendant*.	No. 27761

MEMORANDUM OPINION

This is an action to recover business and occupation taxes levied under the provision of RCW 82.04.220. The matter was tried upon an agreed statement of facts, to which reference is made for particularity. In general, the case concerns iron and steel products sold upon orders received by plaintiff's Seattle salesmen, and shipped to Washington customers f.o.b. points of origin without the state. "Approximately 25% of the sales involved iron and steel products manufactured by the taxpayer in the State of California. The remaining approximately 75% of the sales involved iron and steel products which were purchased by the taxpayer in states other than the State of Washington from manufacturers located therein and which were not manufactured from the taxpayer's own materials or ingredients." (Supplemental Agreed Statement of Facts.)

The case at bar is ruled by *B. F. Goodrich Co. v. State*, 38 Wn.(2d) 663, and *Field Enterprises ,Inc., v. State*, No. 33120, decided November 17, 1955. Each of the foregoing cases was a unanimous *en banc* decision. The facts in the instant case present no legally significant difference from the facts of the *Goodrich* and *Field* cases *supra*. The defendant will prevail.

/s/ RAYMOND W. CLIFFORD
Judge

December 5, 1955

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

UNITED STATES STEEL CORPORATION, a New Jersey Corporation, *Appellant*, vs. THE STATE OF WASHINGTON, *Respondent*.	Tuesday December 3, 1957 No. 33747 Thurston County No. 27761

JUDGMENT

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, it is now, on this 3rd day of December, A.D. 1957, on motion of John J. O'Connell, Esquire, of counsel for respondent, considered, adjudged and decreed, that the judgment of said Superior Court be, and the same is hereby affirmed with costs; and that the said State of Washington have and recover of and from the said United States Steel Corporation, a New Jersey corporation, and from Hartford Accident and Indemnity Company, surety to the extent of $200.00, the costs of this action taxed and allowed at Two Hundred thirty-six and 62/100 ($236.62) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Entered of record in Journal 41
at page 692 in the
Office of the Clerk of the
Supreme Court.

APPENDIX D

THE STATUTE

Revised Code of Washington

82.04.220 *Business and occupation tax imposed.* There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

* * *

82.04.240 *Tax on manufacturers.* Upon every person except persons taxable under subsection (2) of RCW 82.04.260[1] engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including byproducts, manufactured, multiplied by the rate of one-quarter of one percent.

The measure of the tax is the value of the products, including byproducts, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state.

82.04.250 *Tax on retailers.* Upon every person engaging within this state in the business of making sales at retail; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of one-quarter of one percent.

* * *

82.04.270 *Tax on wholesalers.* Upon every person except person taxable under subsection (1) of RCW

[1] This subsection deals with the manufacture of flour.

82.04.260[2] engaging within this State in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one percent.

* * *

82.04.295 *Temporary surtax imposed.* From and after the first day of November, 1951, until the thirtieth day of April, 1953[3], there is levied and shall be collected from every person for the act or privilege of engaging in business activities, as a part of the tax imposed by this chapter and as a temporary increase thereof, a surtax in the amount of twenty percent of the tax payable under this chapter.

* * *

82.04.430 *Deductions enumerated.* In computing tax there may be deducted from the measure of tax the following items:

* * *

(6) Amounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States;

* * *

82.04.440 *Persons taxable on multiple activities.* Every person engaged in activities which are within the purview of the provisions of two or more of section RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in: *Provided,* that persons taxable under RCW 82.04.250 or 82.04.270 shall not be taxable under RCW 82.04.230, 82.04.240, or subsection (2) of RCW 82.04.-

---

[2] This subsection deals with wholesalers of grain.

[3] Temporary surtax continuously extended, increased, and made permanent at the rate of sixty percent by Laws of 1957, Chap. 279, §5; RCW 82.04.296 (1957).

260 with respect to extracting or manufacturing of the products sold, and that persons taxable under RCW 82.04.240 shall not be taxable under RCW 82.04.230 with respect to extracting the ingredients of the products so manufactured.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

NO. 163

UNITED STATES STEEL CORPORATION, *Appellant*,

v.

STATE OF WASHINGTON, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

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STATE PRINTING PLANT, OLYMPIA, WASH.

In the Supreme Court of the United States

OCTOBER TERM, 1958

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In the Supreme Court of the United States

OCTOBER TERM, 1958

NO. 163

UNITED STATES STEEL CORPORATION, *Appellant*,
v.
STATE OF WASHINGTON, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed on the ground that the appeal does not raise a substantial Federal question.

STATUTES INVOLVED

The tax involved in the above appeal is imposed by RCW 82.04.220, RCW 82.04.250 and RCW 82-.04.270, §§ 1-4 (c) and (e), chapter 5, Laws of 1950, Ex. Sess. § 1-4 provides:

"From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows:"

Section 1-4 (c) provides:

"Upon every person engaging within this state in the business of making sales at retail; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of one-quarter of one per cent;"

STATEMENT OF THE CASE

This case was initiated by appellant in the Superior Court of the State of Washington to recover a refund of the business and occupation tax assessed against it by the state for the privilege of engaging in business in the state of Washington. The action was for a refund of the *entire* amount of the taxes paid by the appellant with respect to the sales of goods to Washington customers which were not warehoused in the state of Washington prior to sale. In its action in the Superior Court of the State of Washington appellant *did not ask for an apportionment* of any amount of the tax. Contrary to the implication from appellant's statements on page 2 of its Jurisdictional Statement, appellant did not base its claim of invalidity on the failure of the State Tax Commission to apportion the tax but sought the

refund solely on the ground that the tax was unlawfully imposed with respect to sales immune from taxation under the Commerce Clause of the Federal Constitution.

FACTS

The appellant is qualified to conduct business in the state of Washington. Its business consists of the manufacture and sale of iron and steel products. Insofar as the controversy involved here is concerned, all of its products were manufactured outside the state of Washington. Approximately 25% of the products sold in the state of Washington were manufactured by the appellant itself. The remaining 75% of the products sold by appellant were acquired from other manufacturers and in turn sold to appellant's Washington customers.

During the period in question the appellant rented warehouse space within the state of Washington in which it maintained one stock of goods—wire rope. Business and occupation tax was paid upon all sales from this warehouse, and those sales are not in issue here.

In the conduct of its business activity in the state of Washington, appellant maintained a sales office within the state employing 42 persons, all of whom were residents of the state. Salesmen from the Seattle office called upon prospective purchasers and when a sale was made the customer's order was acknowledged by the Seattle office. The Washington

employees in the Seattle office investigated the customer's credit and generally gave final credit approval and negotiated the terms of payment. Orders would be forwarded by the Seattle office to the mill producing the particular product ordered. When the mill advised that the goods ordered would be available, Seattle office employees mailed the customer a written acknowledgment of the order, which constituted acceptance.

Seattle personnel investigated customer complaints and made recommendations as to settlements to be approved by appellant's San Francisco office. If requested appellant supplied engineering service to its customers to check complaints relative to goods purchased and for consultation services within the state.

Delinquent accounts were pursued by appellant's Washington office and the customers made payment for the goods to appellant's offices within or without the state, whichever the customer preferred. The appellant maintained a bank account in the state of Washington to which its payments were deposited. Substantially all contacts with Washington customers relating to any matter connected with a sale were made by the Seattle office. During the 17 months from August 1, 1950, through December 31, 1951, appellant's Washington office sold $20,319,096.81 worth of goods to Washington customers.

The tax was sustained by the State Superior Court (unreported) and the State Supreme Court,

reported unofficially at 151 Wash. Dec. 200, and set forth as Appendix A in Appellant's Statement as to Jurisdiction.

In upholding the validity of the tax, the Washington Supreme Court stated:

> "Appellant argues that the tax should be apportioned between interstate and local activities. There is no question of apportionment here. The tax is measured solely by appellant's local wholesale and retail activities. No part of the tax is attributable to its manufacture or other out-of-state activities. The sales are negotiated within the state of Washington, and the fact that delivery is made direct to the purchaser does not change the nature of the local transaction. *Norton Co. v. Department of Revenue of the State of Illinois*, 340 U. S. 534, 95 L. ed. 517, 71 S. Ct. 377; *Field Enterprises Inc. v. State, supra.*"

ARGUMENT

I.

NEITHER THE COMMERCE CLAUSE NOR ANY APPLICABLE DECISION OF THE UNITED STATES SUPREME COURT REQUIRE REDUCING THE AMOUNT OF THE TAX IMPOSED UPON APPELLANT'S LOCAL SALES ACTIVITY.

Appellant now concedes as illustrated by the questions raised on appeal that its sales activity in the state of Washington subjects appellant to the taxing power of the state. Thus, appellant acknowledges there was sufficient local activity to sustain the imposition of the tax without doing violence to the Commerce Clause of the Federal Constitution.

Accordingly, this appeal does not challenge the imposition of the tax, but only the amount.

Recognizing that it would be impossible to convince this Court that the decision of the Supreme Court of the State of Washington was in error in finding sufficient local activity, appellant hopes by this appeal in raising an issue of apportionment to achieve the same result. Although appellant attempts to convince this Court that the instant case represents an issue of apportionment, it is apparent that rather than apportionment being involved appellant actually is contending that because it manufactures its product in one state which may be sold by its personnel in another that the tax imposed on sales activity by the state of the buyer should to some extent be reduced or be less than the full measure of the tax because the manufacturing process is conducted in the other state. In substance, appellant, though conceding its activity is taxable, is now urging that it shouldn't have to pay the full measure of the tax, but only a part of it.

This appeal should be dismissed because the issue raised has already been decided by this Court in *Field Enterprises v. State*, affirmed, 352 U. S. 806; *Norton Co. v. Dept. of Revenue*, 340 U. S. 534, 95 L. ed. 517 (1951); and *B. F. Goodrich v. State*, 38 Wn. (2d) 663; Cert. denied, 342 U. S. 876, 96 L. ed. 659.

A.

Although apportionment in a proper case is a method assuring an equitable division among the several states of taxes upon multi-state business, this case does not represent such a situation. In the instant case the tax involved has as its incident the local selling activities of appellant and is not imposed upon selling activities conducted in any other state. The measure of the tax is simply the rate times the gross proceeds of local sales.

The United States Supreme Court has never held that a tax similar to that involved here imposed upon a local activity must be reduced (or apportioned as appellant suggests) because the taxpayer engages in other and different activities in other states. Only those taxes which are imposed upon incidents which can be equally reached by several states must be apportioned. Where the incident is such that only one state can impose a tax there is obviously no reason or justification for reducing the measure of the tax.

The instant appeal involves the same issue as presented in *Field Enterprises v. State, supra,* 47 Wn. (2d) 852, affirmed, 352 U. S. 806 (1956). This case involved the same statute here involved and practically the identical method of conducting business. The only significant distinction in the facts is that appellant's local activity in this case is of considerably greater magnitude and substance than was the case in *Field Enterprises.*

Had this Court felt that the amount of the tax must be reduced because of the relevancy and validity of the issue of apportionment, the United States Supreme Court would not have affirmed the judgment of the highest court of the state of Washington in the *Field Enterprises* case. Appellant in support of its contention that a substantial federal question is presented by its appeal has not and cannot refer the court to any case involving a similar tax on a similar activity requiring the tax be reduced or something less than the full measure upon an admitted local activity.

B.

In its statement as to jurisdiction appellant relies principally upon *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307 (1938), and *Hans Rees' Sons v. North Carolina ex rel. Maxwell*, 283 U. S. 123 (1931). Neither of these two decisions are applicable or sustain the contention advanced by appellant.

In the *Adams Mfg.* case the court simply held that Indiana could not impose a gross receipts tax on the *sales* of goods because the products were manufactured in Indiana. The court struck down the tax because it

> "is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured."

The court in the *Adams* case further noted the Indiana tax was

> "not an excise upon the privilege of producing or manufacturing within the state."

It is thus clear that the "multiple burden" danger properly concerning the court in the *Adams* case is not present here. The Washington tax on gross proceeds of sales to Washington customers cannot be duplicated by any other state.

Hans Rees' Sons v. North Carolina, supra, likewise offers appellant no support for its position. We have no quarrel with the above decision. It has no application here. *Hans Rees* involved a *net income* tax on a unitary business. The instant controversy involves an excise tax—not a net income tax. While apportionment was proper in *Hans Rees*, the court has never found such a requirement to be applicable to the type of tax on the kind of local activity involved herein. A comparison of *Hans Rees* with *American Mfg. Co. v. St. Louis*, 250 U. S. 459 (1919) makes this distinction apparent.

In the *American Mfg. Co.* case an excise tax upon the privilege of manufacturing was sustained even though measured by gross receipts of sales made outside the taxing state. No apportionment was required.

C.

On page 8 of Appellant's Statement as to Jurisdiction, the following statement appears which should not stand unchallenged:

> "If every state levied a tax such as the Washington business and occupation tax (a tax upon the privilege of engaging in business activities without regard to the extent to which those activities occur within the state) each interstate business would pay *double* the tax paid by its local competitors."

Not only is the above observation without support in fact but as a legal conclusion is untenable. In the first place the instant tax, as stated before, is restricted in measure to gross proceeds of sales to Washington customers. The extent of appellant's activity subject to the tax is limited to its local activity within the state of Washington — nothing more—nothing less. The incidence of the tax has clear regard only to the results dollarwise of the sales activity of appellant's personnel soliciting business in Washington.

This fact destroys the validity of appellant's unsupportable conclusion that appellant is to pay "double the tax paid by its local competitors." Appellant is not taxed twice by Washington's business tax. No other state can subject appellant to taxation of its gross proceeds of sales derived from Washington customers. The fact that appellant may pay a

different tax on a different activity to a different state for privileges accorded by that state is not a material fact nor a valid circumstance in determining any possible conflict between the Washington tax and the provisions of the Federal Commerce Clause. There is nothing inherent in the tax as applied to appellant on its Washington activity which is in any sense in conflict with the standard or rule announced in *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250 (1938).

II.

NO DISCRIMINATION AGAINST APPELLANT CAN BE SHOWN BECAUSE APPELLEE FAILED TO REDUCE THE TAX.

For two pages, commencing on page 18 of Appellant's Statement as to Jurisdiction, it is suggested that the tax involved here discriminates against interstate commerce. No authority is cited by appellant in support of this assertion. Among others, the case of *B. F. Goodrich v. State*, 38 Wn. (2d) 663, Cert. denied, 342 U. S. 876, 96 L. ed. 659 (1951), completely disposes of appellant's contention in this respect.

CONCLUSION

It is respectfully submitted that no substantial Federal question is raised by the appeal and it should be dismissed.

July 25, 1958.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General,

ROBERT L. SIMPSON,
Assistant Attorney General,

Attorneys for Appellee.

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IN THE

Supreme Court of the United States

October Term, 1958

No. 163

UNITED STATES STEEL CORPORATION,
Appellant,

v.

STATE OF WASHINGTON.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION OF BERKSHIRE HATHAWAY, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND PROPOSED BRIEF *AMICUS CURIAE*

TRUMAN HENSON,
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ARGUMENT:

A local tax imposed for the privilege of doing business in a taxing state, and measured by gross receipts, is unconstitutional as repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States, when applied to a taxpayer whose only activity in the taxing state is the negotiation of sales of goods which are in, and which are delivered to the purchasers in, another state 9

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IN THE

Supreme Court of the United States

October Term, 1958

No. 163

UNITED STATES STEEL CORPORATION,

Appellant,

v.

STATE OF WASHINGTON.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

BERKSHIRE HATHAWAY, INC., respectfully moves for leave to file a brief *amicus curiae* in the above-entitled cause.

The consents of the attorneys for the parties were requested, but were refused on the ground that the relevant question saved in the Notice of Appeal is limited to apportionment, as stated therein, and that the proposed brief *amicus curiae* is not directed to that question. Inasmuch as the tax at issue is a state privilege tax measured by gross receipts from all sales, excepting those exempt under the Constitution of the United States, it is submitted that the point to which the proposed brief is addressed, namely, that the state is prohibited by the Commerce Clause from taxing the proceeds of separable interstate sales where the taxpayer's only activity within the taxing state in respect of such sales is the negotiation thereof, is a point of apportionment. In any case, it is submitted that the decision below, sustaining the tax on the proceeds of such interstate sales, represents a plain error this Court may wish to notice and correct.

The interest of Berkshire Hathaway, Inc., in this case arises from the fact that it is a party to a case about to be appealed to the Court of Appeals of the State of New York,[1] involving the New York City General Business and Financial Tax,[2] and raising the same issue deemed presented in the instant case, to wit, whether a taxpayer which maintains an office in a taxing state, through which office it negotiates sales of goods which are in another state, is subject to a tax imposed by the taxing state for the privilege of doing business therein and measured by the gross receipts from such sales, although the goods are delivered to the purchasers outside the taxing state, and although the taxpayer engages in no activities in the taxing state other than such negotiation of such sales.

In its brief filed in the instant case in the Supreme Court of the State of Washington, the State argued that this Court's *per curiam* decision in *Field Enterprises, Inc.* v. *State of Washington* (1956), 352 U. S. 806, 77 Sup. Ct. 55, 1 L. Ed. (2d) 39, which decision was on the authority of *Norton Co.* v. *Dept. of Revenue* (1951), 340 U. S. 534, 71 Sup. Ct. 377, 95 L. Ed. 517, governed and disposed of the instant case; and the Washington Court so held. In appellant's brief, on the other hand, it was not argued either

> (a) That the *Field* case is distinguishable from the instant case in that, in the instant case, deliveries were made outside the taxing state, by shipment f.o.b. at the purchasers' cost and risk, whereas, in the *Field* case, deliveries were made inside the taxing state, by shipment at the taxpayer-seller's cost and risk pursuant to contracts of sale so requiring (Rule 5, Section 63.04.200, Revised Code of Washington), or

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[1] *Berkshire Fine Spinning Associates, Inc.* v. *City of New York, et al.*, decided July 3, 1958, by App. Div., 1st Dept., N. Y. Law Journal, July 7, 1958, p. 2, not yet otherwise reported.

[2] Invalidated by this Court in *Joseph* v. *Carter & Weekes Stevedoring Co.* (1947), 330 U. S. 422, 67 Sup. Ct. 815, 91 L. Ed. 993, and *Gerosa* v. *United Piece Dye Works* (1955), 348 U. S. 916, 75 Sup. Ct. 298, 99 L. Ed. 718, as applied to interstate commerce.

(b) That the *Norton* case, while requiring the decision of taxability rendered by the Supreme Court of Washington in the *Field* case, wherein deliveries were made inside the state, required the opposite conclusion in the instant case, wherein deliveries were made outside the state.

In the Jurisdictional Statement herein, neither of those points is made, nor is it urged that the Commerce Clause prohibits a state privilege tax measured by gross receipts from sales of goods located and delivered outside the taxing state, where the activities of the taxpayer in the taxing state are limited to the negotiation of such sales.

Accordingly, said Berkshire Hathaway, Inc., apprehends that the error believed to have been committed by the court below, in its interpretation of the *Norton* and *Field* cases, may not be brought to the attention of this Court, and that the constitutional issues deemed raised by the instant case may not be fully briefed and presented to this Court, unless the proposed brief *amicus curiae* is received. In such brief, it is argued that the decision of this Court in the *Field* case has no bearing on the instant case, and that the Commerce Clause of the Constitution, together with the precedent of the *Norton* case and prior and subsequent decisions of this Court cited in said brief, indicate that the decision of the Supreme Court of Washington in the instant case should be reversed. If accepted, it is believed that said arguments are sufficient to dispose of the instant case.

If accepted, it is believed that said arguments will also dispose of said *Berkshire* case, *supra*, footnote 1, in a lower court, inasmuch as the contention made by the City of New York and accepted by the New York Appellate Division therein is that the *Norton* case, or, in any event, the *Field* case, overrules prior law and represents the enunciation by this Court of a new doctrine to the effect that the Commerce Clause does not prohibit a local privilege tax on the

gross receipts of a taxpayer which maintains an office in a taxing state, although the only activities of the taxpayer in the taxing state consist of the negotiation of sales of goods which are in, and which are delivered to the purchasers in, other states. In that case, two of the five Justices dissented, stating: "In the light of the history of the *Field* case before the Supreme Court, there is not sufficient basis for erecting, in the state courts, an entirely new set of principles with economic and legal ramifications unexpressed, to be implied only at the peril of great economic and governmental uncertainty."

Respectfully submitted,

TRUMAN HENSON,
Attorney for Berkshire Hathaway, Inc., as Amicus Curiae,
Office & P. O. Address,
120 Broadway,
New York 5, N. Y.

Dated: New York, N. Y.,
July 14, 1958.

IN THE

Supreme Court of the United States

October Term, 1958

No. 163

UNITED STATES STEEL CORPORATION,

Appellant,

v.

STATE OF WASHINGTON.

BRIEF OF BERKSHIRE HATHAWAY, INC., AS *AMICUS CURIAE*

The Interest of the *Amicus Curiae*

The interest of Berkshire Hathaway, Inc. (formerly Berkshire Fine Spinning Associates, Inc.), in this case arises from the fact that it is a party to a case about to be appealed to the Court of Appeals of the State of New York,[1] involving the New York City General Business and Financial Tax,[2] and raising the same issue as that deemed presented to the Court in the instant case; to wit, whether,

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[1] *Berkshire Fine Spinning Associates, Inc.* v. *City of New York, et al.*, decided July 3, 1958, by the New York Supreme Court, Appellate Division, First Department, N. Y. Law Journal, July 7, 1958, p. 2, not yet otherwise reported; same case below, CCH New York State Tax Reporter, Vol. 4, Para. 198-021, not officially reported.

[2] Invalidated by this Court in *Joseph* v. *Carter & Weekes Stevedoring Co.* (1947), 330 U. S. 422, 67 Sup. Ct. 815, 91 L. Ed. 993, and *Gerosa* v. *United Piece Dye Works* (1955), 348 U. S. 916, 75 Sup. Ct. 298, 99 L. Ed. 718, as applied to interstate commerce.

in view of the Commerce Clause of the Constitution, a taxpayer which maintains an office in a taxing state, through which office the taxpayer negotiates sales of goods which are in another state, for the purpose of introducing them into the taxing state, is subject to a tax imposed by the taxing state for the privilege of doing business therein and measured by the gross receipts from such sales, although the goods are delivered to the purchasers outside the taxing state, and although the taxpayer engages in no activities in the taxing state other than such negotiation of such sales across state lines.

Abbreviated Statement of the Case

The Washington tax involved in this case was imposed "* * * for the act or privilege of engaging in business * * * upon every person engaged within this state in the business of making sales at retail * * * [or] * * * at wholesale * * *," it was measured by "* * * the gross proceeds of sales * * *," and it excluded from the tax base "* * * amounts derived from business which the state is prohibited from taxing under * * * the Constitution or laws of the United States." (RCW, Secs. 82.04.220, 82.04.250, 82.04.270, 82.04.430(6).)

Appellant (or its predecessor), a Delaware corporation with principal office in California, was qualified to do business in Washington, and had an office there. The Washington office served as headquarters for appellant's salesmen, who solicited orders from Washington customers and turned in the orders to the Washington office. Employees at that office investigated and determined the credit of the prospective customers, and forwarded the orders to appellant's out-of-state plants to be filled with goods located out-of-state. The goods were delivered, and title passed, out-of-state, by shipment f.o.b. at the customers' cost and risk. Payment was made, at the customers' election, to appel-

lant's Washington or out-of-state offices. Appellant maintained a bank account in Washington, in which payments there received were deposited; and delinquent Washington accounts were pursued by the Washington office, which also received complaints and made recommendations for settlement, but no decisions in that regard.

Appellant neither operated nor maintained any local outlet, store, plant, factory, warehouse, other place of business, or stock of goods in Washington, except that, partly in a rented warehouse, and partly on consignment, it kept a small quantity of one of its numerous items of iron and steel products; to wit, wire rope, in the state. About 1¼% of appellant's total sales to Washington customers consisted of sales of such wire rope; but the tax on the proceeds of those sales is conceded to have been proper, and is not in issue here. Only about 2¼% of appellant's total sales to Washington customers consisted of other sales of wire rope; and substantially none of appellant's wire rope customers were customers for its other products, sales of which made up between 96½% and 97% of its total sales to Washington customers.

Thus, apart from the aforesaid local sales of part of its wire rope, which sales, as stated, are not in issue here, and were dissociated from appellant's other business, appellant's sole and only activity in the State of Washington consisted of the negotiation of sales of goods which were in, and which were delivered to the purchasers in, other states.

The Supreme Court of Washington sustained the tax on the gross proceeds of all of appellant's sales to Washington customers.

Summary of Argument

Prior to the decision of this Court in *Norton Co.* v. *Dept. of Revenue* (1951), 340 U. S. 534, 71 Sup. Ct. 377, 95 L. Ed. 517, the law seemed clear that the channeling of orders through a local office in a taxing jurisdiction did not deprive otherwise interstate transactions of the protection of the Commerce Clause, or subject the proceeds of sales of goods so ordered to local privilege taxes measured by the gross receipts from such sales, where the goods were located outside, and were delivered to the purchasers outside, the taxing jurisdiction, and where the activities of the local office, and of the taxpayer in the taxing jurisdiction, were limited to the negotiation of such sales.

Neither the decision of this Court in the *Norton* case, *supra*, nor its subsequent decision in *Field Enterprises, Inc.* v. *State of Washington* (1956), 352 U. S. 806, 77 Sup. Ct. 55, 1 L. Ed. (2d) 39, varied that rule. On the contrary, the *Field* case does not involve the point; and both the *Norton* case itself and this Court's subsequent denial of certiorari in *Gerosa* v. *United Piece Dye Works* (1955), 348 U. S. 916, 75 Sup. Ct. 298, 99 L. Ed. 718, indicate that the rule continues in force without change.

Accordingly, the tax asserted against appellant herein by the State of Washington violates the Commerce Clause of the Constitution; the decision below, upholding that tax, is erroneous; and that decision should be reversed.

ARGUMENT

A local tax imposed for the privilege of doing business in a taxing state, and measured by gross receipts, is unconstitutional as repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States, when applied to a taxpayer whose only activity in the taxing state is the negotiation of sales of goods which are in, and which are delivered to the purchasers in, another state.

It is confidently submitted as firmly established that the solicitation, in a taxing jurisdiction, of sales of goods which are in, and which are delivered to purchasers in, other states is not a sufficient activity to serve as the basis for a local privilege tax; and, at least until this Court's decision in the *Norton* case, *supra*, it seemed equally well established that the rule applied with equal force where the seller maintained an office in the taxing jurisdiction to which his solicitors reported, and through which the orders they obtained were transmitted.

> *Cheney Bros. Co.* v. *Mass.* (1918), 246 U. S. 147, 38 Sup. Ct. 295, 62 L. Ed. 632;
> *Alpha Portland Cement Co.* v. *Mass.* (1925), 268 U. S. 203, 45 Sup. Ct. 477, 69 L. Ed. 916.

Assiduous tax collectors, however, have seized upon the *Norton* case as overruling prior authority and enunciating a new doctrine: that the existence of a local office through which orders may be transmitted represents a local activity sufficient to support a privilege tax, although the goods are located and delivered outside the taxing state, and although the taxpayer's only activity in the taxing state is the negotiation of such sales. Further, the subsequent decision of this Court in the *Field* case, *supra*, is declared to have removed any possible doubt that such is the effect

of the *Norton* case, and definitely to have fixed and established the asserted new doctrine.

Thus, in its brief before the Supreme Court of the State of Washington herein, the State asserted, of the *Norton* case, and without limitation by reference to Norton's local activities in Illinois: "The United States Supreme Court held that all of Norton's sales were subject to the tax where its local office had been utilized *either* in receiving the orders *or* in distributing the goods to the purchasers."

Again, in its brief before the New York Appellate Division, in the above-mentioned case in which this *amicus curiae* is a party, the City of New York argued that if Norton's local activity lent credence to the suggestion that it was that activity that was the decisive point in that case, at least it was clear that the *Field* case laid down the unequivocal rule that the existence of a local office engaged actively, albeit exclusively, in the negotiation of sales of goods located and delivered in other states, is sufficient to support a local privilege tax on the gross receipts from such sales. Three of the Justices of the Appellate Division (a majority) accepted this contention, and held the *Field* case dispositive of the issue, although the other two Justices dissented, stating: "The decision of the Supreme Court in *Field Enterprises* v. *State of Washington* (352 U. S. 806) presents a problem. * * * If the *Field* case affirmance means all that it potentially means, then the *United Piece Dye Works* case [supra] was wrongly decided, despite the denial of certiorari by the Supreme Court. * * * Before, however, the state courts should effect so drastic a reversal of position, it would seem wiser to await a clearer direction from the Supreme Court. In the light of the history of the *Field* case before the Supreme Court, there is not sufficient basis for erecting, in the state courts, an entirely new set of principles with economic and legal ramifications unexpressed, to be implied only at the peril of great economic and governmental uncertainty."

Finally, in the instant case, the Supreme Court of Washington rested its decision on the authority of the *Norton* and particularly the *Field* cases, stating: "* * * the sales activities of the Seattle office of appellant are decisive factors in establishing and holding the local market for its goods. Thus it is subject to the tax."

It is the purpose of this brief to present the view (a) that the *Norton* case not only does not decide that the existence of a local office engaged exclusively in negotiating sales across state lines renders intrastate otherwise interstate sales, but, on the contrary, affirmatively holds that even where there are also extensive plainly local activities, the proceeds of sales negotiated in the taxing jurisdiction, but not generated by the local activities, may not be included in the tax base when the goods are located and delivered outside the taxing jurisdiction; (b) that the *Field* case is wholly inapplicable here because its *ratio decidendi* is that Field, in addition to maintaining a local office, also made local delivery of its goods; and (c) that, as indicated by this Court's denial of certiorari in *Gerosa* v. *United Piece Dye Works*, *supra*, the post-*Norton*, as well as the pre-*Norton*, rule is that where the only activity of a taxpayer in a taxing state is the negotiation of sales of goods which are in, and which are delivered to purchasers in, other states, the Commerce Clause renders him immune to local privilege taxes, whether or not he maintains a local office.

It is submitted that the above-mentioned contentions of the State of Washington and the City of New York, and the decisions of the court below herein, and of the New York Appellate Division, are erroneous in that they fail to distinguish between the services Norton's Illinois branch rendered to customers, on the one hand, and such services as appellant's Washington office rendered to appellant, on the other. The one were plainly local in character; but the other were as plainly integral component parts of interstate commerce.

Norton, a Massachusetts corporation, authorized to do business in Illinois, therein operated and maintained a warehouse and retail store where it regularly made sales over the counter of the (about 3,000 items of) goods carried in stock in its local warehouse, and also received and transmitted orders for certain other goods not carried in stock in Illinois. In addition, Norton locally served customers by physically servicing and repairing machines, after sale. The local office further served Illinois purchasers of goods not carried in local stock by combining orders and arranging for their shipment in carload lots, at reduced freight rates, to the local office, thereafter making local distribution and delivery. In sum, Norton's Illinois branch provided customers with all the conveniences and services a purely local establishment would have supplied.

Norton made four classes of sales to Illinois customers:

> *One*: Sales over the counter at the retail store of goods carried in stock in Illinois. These were conceded and held to be taxable.
>
> *Two*: Sales of goods not carried in stock in Illinois, shipped into the state on orders channeled through the local outlet, and delivered locally. A unanimous Court held these sales taxable.
>
> *Three*: Sales of goods not carried in stock in Illinois, shipped into the state directly to customers on orders channeled through the local outlet, where delivery was made outside the state. In the absence of a showing that these orders were not generated by the conveniences and services rendered locally to customers, and on the basis that one who asserts his rights to the benefits of an exemption must prove his case, the Court, with one Justice dissenting, held these sales taxable.
>
> *Four*: Sales of goods not carried in stock in Illinois, shipped into the state directly to customers

on orders not channeled through the local outlet, where delivery was made outside the state. With three Justices dissenting, the Court held these sales exempt from the tax.

In the instant case, appellant, for its own purposes, and for its own convenience, maintained a Washington office, through which its solicitors transmitted the orders they obtained; but, although this may have represented a service rendered by appellant to itself, it did not constitute a service to customers. Unless in respect of its sales of wire rope, which were dissociated from the bulk of its business, appellant's Washington office did not provide local services or conveniences to customers. Customers' contacts were with appellant's solicitors; and whether appellant's solicitors forwarded orders to appellant's out-of-state plants by one route or another, could have been of no moment to the customers. The maintenance and activities of appellant's Washington office were not, therefore, factors, decisive or otherwise, in establishing or holding its Washington market. It was the activities of appellant's solicitors that generated appellant's sales to inhabitants of Washington; and therefore those sales were in all essentials comparable to the fourth, and not the third, class of Norton's sales to Illinois customers.

Thus, the *Norton* case, far from furnishing authority for taxing appellant's sales, constitutes the strongest authority for exempting them, for Norton carried on local activities of great relative magnitude, whereas appellant did not.

That the foregoing view of the meaning and effect of the *Norton* case is correct, and that the above-mentioned interpretation of the *Norton* case urged by the State of Washington, urged by the City of New York, and adopted by the Supreme Court of Washington in its opinions in the *Field* case and the instant case, is erroneous, is, we submit, apparent on analysis of the *Norton* case itself. Beyond that,

however, this Court denied certiorari, and by that denial affirmed the decision of the Court of Appeals of the State of New York, in *Gerosa* v. *United Piece Dye Works, supra.*

The *Dye Works* case came to this Court after its decision in the *Norton* case had been rendered, and it presented precisely the question presented in the instant case: whether the existence and activities, in the taxing jurisdiction, of an office actively, but exclusively, engaged in negotiating sales of goods (services) located and delivered outside the taxing jurisdiction would suffice as the foundation on which to base a local privilege tax. The New York court held that the Commerce Clause prohibited the tax; and this Court, with its recent *Norton* decision before it, denied certiorari.

It may be urged by the proponents of the asserted new doctrine that this Court's action in the *Dye Works* case was only a denial of certiorari; and that, if the fact that most of Norton's activities in Illinois were local beclouds the purity of that decision's presentation of the asserted new rule, at least this Court's *Field* decision establishes that rule beyond the peradventure of any further doubt. But we submit that this contention also is erroneous, and that its error resides in a failure to give consideration or effect to the factor we deem to have been decisive in the *Field* case, and which distinguishes the *Field* case from the instant case.

It is true that Field's office in Washington was engaged only in soliciting sales of goods located in another state, and it is true that Field maintained no local store or outlet in Washington; but the factor that is ignored is that it was in Washington that Field delivered all its goods sold to Washington customers.

The Washington court, in its opinion in the *Field* case, accorded the point no apparent weight; but the fact nevertheless was that all of Field's sales to Washington customers were made under contracts requiring Field to prepay the cost of transportation. Thus, under the provisions

of the Uniform Sales Act (Rule 5, Sec. 63.04.200, RCW), title did not pass until delivery to the customers in Washington. Although Field shipped its books from out-of-state directly to its Washington customers, all shipments were at Field's cost and risk, and the books were Field's books until they were delivered to the purchasers in Washington.

On the basis of the fact that this Court's decision in the *Field* case was *per curiam*, and without opinion, except as the *Norton* case was cited, the proponents of the alleged new doctrine attempt to assimilate the *Field* case to that part of the *Norton* decision that dealt with the third class of Norton's sales—those generated by the local services. But Field rendered no local services: and, in our view, it is plain that the portion of the *Norton* decision that in fact governed the *Field* case was the portion that dealt with the second class of Norton's sales—those of goods shipped into the state on order, but delivered locally.

We submit that, although the decision of the Washington court in the *Field* case was right, and was required by the *Norton* case, that court's reasons for its decision, as expressed in its opinion, were wrong; and we submit further that the fact that this Court affirmed the decision of the Washington court indicates no approval of the reasoning of that state tribunal. Accordingly, we urge that the *Field* case does not touch or involve the issue presented in the instant case; we submit that the *Field* decision does not in anywise vary the rule that the Commerce Clause forbids a local privilege tax based on the negotiation in a taxing state, whether or not through a local office therein, of sales of goods located and delivered outside the state.

Conclusion

We respectfully advance the conclusion that (a) the law before the *Norton* case was that the negotiation in a taxing state of sales of goods located and delivered in another state is not an activity sufficient to support a privilege tax; (b) that such was the law whether or not an office, whose activities were limited to such negotiation, was maintained in the taxing state; (c) that the *Norton* case did not change, but, on the contrary, confirmed, that rule; (d) that the *Dye Works* case further confirmed it; (e) that the *Field* case does not involve the point, and is irrelevant; and (f) that the law existing today, and applicable to the instant case, is that the negotiation in a taxing jurisdiction of sales of goods located and delivered in another state is not an activity that will support the imposition of a local privilege tax, whether or not an office, whose activities are limited to such negotiation, is maintained in the taxing jurisdiction.

Article I, Section 8, Clause 3, of the Constitution of the United States prohibits the tax asserted against appellant; the decision below was erroneous; and that decision should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 163

UNITED STATES STEEL CORPORATION, *Appellant,*

vs.

STATE OF WASHINGTON.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS

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UNITED STATES STEEL CORPORATION, *Appellant*, vs. STATE OF WASHINGTON.	No. 163

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS

Appellant, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, files this brief in opposition to the Appellee's Motion to Dismiss.

STATEMENT OF THE CASE

On page 6 of its Motion, Appellee contends that the issue of apportionment was not raised in the trial court. The issue was presented to, and argued before, the Superior Court of the State of Washington for Thurston County. Furthermore, the stipulation of facts on which the case was tried contained factual information relating to the activities of the Appellant within and outside the State of Washington which had relevance *only* to the issue of apportionment and were included in the stipulation because all parties considered the issue of apportionment to have been properly before the court. The Supreme Court of the State of Wash-

ington considered that the issue of apportionment was properly before the court and made a ruling on the merits on that issue, which ruling was adverse to the Appellant. *United States Steel Corporation v. State of Washington,* 151 Wash. Dec. 206, 202, 316 P.2d 1099, 1101 (1957).

It is true that Appellant's Complaint contained a prayer for refund of all taxes involved in the action. However, apportionment is not the only issue raised in this case. Appellant has also raised the question of the invalidity of the tax under the commerce clause because it discriminates against interstate commerce and in the event this contention is sustained by this Court, it is Appellant's position that it is entitled to a refund of all taxes.

ARGUMENT

A. Apportionment

On Pages 10 and 11 of Appellee's Motion to Dismiss it is asserted that the issue of apportionment raised here by Appellant was determined by this Court in *Field Enterprises, Inc. v. State of Washington,* 47 Wn. 2d 852, 289 P.2d 1010 (1955); affirmed 352 U.S. 806 (1936); *Norton Co. v. Department of Revenue,* 340 U.S. 534 (1951); *B. F. Goodrich v. State,* 38 Wn.2d 663, 231 P.2d 325, cert. den. 342 U.S. 876 (1951). Actually the issue of apportionment was not involved in any of those decisions. Those cases held that the sales in question were subject to the taxing power of the State but no ruling was made upon the constitutionality of the measure of the tax. In the privilege tax field there is

lacking a definitive expression by this Court of the obligation of each state to utilize apportoinment to limit its privilege tax to the value of the privilege conferred. A decision by this Court in the case at bar is necessary to settle this important constitutional question.

On Page 14 of the Motion to Dismiss Appellee challenges a statement made on Page 8 of the Statement as to Jurisdiction where Appellant stated:

> "If every state levied a tax such as the Washington business and occupation tax (a tax upon the privilege of engaging in business activities without regard to the extent to which those activities occur within the state) each interstate business would pay *double* the tax paid by its local competitors."

Appellant stands on the correctness of that statement.

Appellant believes that it is appropriate to assume that each state has the same tax statute as that being challenged because it is often difficult to determine whether or not a tax imposes a burden on interstate commerce because other states have different types of taxes and rarely is one comparable to another. Furthermore, if this Court is to sustain the validity of the Washington statute, it must of necessity authorize other states to enact similar statutes. If this were to occur it is Appellant's contention that duplications of the tax would be heaped upon interstate commerce. The following example clearly demonstrates this to be the fact.

Appellant, United States Steel Corporation, manufactures in California and sells in interstate commerce to Washington customers. A competitor of United

States Steel Corporation manufactures similar products in a plant in Washington and maintains a sales office in Washington to aid in the sale of its products to Washington customers. For the privilege of engaging in manufacturing and selling activities in Washington the competitor of Appellant pays only one business and occupation tax measured by the gross proceeds of its sales. Appellant on similar sales in interstate commerce to Washington customers pays one such tax measured by the gross proceeds of sales to the State of Washington and (assuming California has the same tax statute) pays a tax to California similarly measured by the gross proceeds of sale. Thus, Appellant would pay two taxes (neither of which is apportioned) for the *privilege* of engaging in the same business activities as its local competitor; and the competitor would pay only one such tax.

Apportionment of each of the taxes to reflect the value of the privilege conferred by each state would have the result of exacting from interstate commerce its fair share of all taxes but would free it from the burdens to which it is now exposed.

B. Discrimination

At Page 15 of its Motion to Dismiss, Appellee attempts to dispose of the second substantial question raised on this appeal by the contention that the issue has been determined by *B. F. Goodrich v. State,* 38 Wn.2d 663, 231 P.2d 325 (1951), cert. den. 342 U.S. 876 (1951). Appellee misinterprets the significance of a denial of certiorari by this Court. Such denial does

not constitute an approval by this Court of the merits of the rulings made by the state court. *United States v. Shubert,* 348 U.S. 222, 228 (1955) and *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 917 (1950). Appellant does not believe that this Court intended by its denial of certiorari in the *Goodrich* case to permit a state to adopt a taxing scheme which penalizes a business only when the channels of interstate commerce are utilized in the marketing of its goods. Washington's tax statute does just that, and in its Motion to Dismiss, Appellee has made no attempt to make a contrary showing.

CONCLUSION

It is respectfully submitted that both the issue of apportionment and the issue of discrimination raised by Appellant under the commerce clause of the United State Constitution are substantial federal questions. Appellant respectfully requests that this Court enter an Order denying Appellee's Motion and noting probable jurisdiction.

Respectfully submitted,

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